

Service Date: October 31, 2003

DEPARTMENT OF PUBLIC SERVICE REGULATION
BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MONTANA

* * * * *

In The Matter Of The Application of DEAN R.)	
CURRY d/b/a/ DIRTY DEEDS)	DOCKET NO. T-03.9.PCN
CONTRACTING)	ORDER NO. 6539
Plains, Montana,)	
Application for a Montana Intrastate)	
Certificate of Public Convenience and)	
Necessity.)	

PROPOSED ORDER

(A.R.M. § 38.2.4802)
APPEARANCES

FOR THE APPLICANT:

Caroline Gill, Esq., Gill Law Office, P.C., 116 E. Railroad, Plains, Montana
59859

FOR THE PROTESTANTS:

Frank Crowley, Esq., Doney, Crowley, Bloomquist, Uda, P.C., Diamond Block
Suite 200, 400 West 6th Avenue, Helena, Montana 59624, appearing on behalf of
BFI Waste Systems of North America, Inc. (BFI).

Peter P. DelGuidice and Rebecca L. DelGuidice, dba B & P Services, P. O. Box
126, Plains, Montana 59859, appearing pro se.

COMMISSION STAFF:

Al Brogan, Staff Attorney, 2701 Prospect Avenue, Helena, Montana 59620.

BEFORE:

Bob Rowe, Chairman, Montana Public Service Commission, and Hearing
Officer.

BACKGROUND

1. On February 25, 2003, the Commission received an application from Dean R. Curry, d/b/a/ Dirty Deeds Contracting (Applicant) for a Certificate of Public Convenience and Necessity, Class D, authorizing the transportation of garbage in Sanders County, Montana. On April 29, 2003, Applicant requested the Commission amend the authorization in his application to read: "Class D – Garbage between all points and places in Sanders County. Carrier is permitted to transport waste generated by construction and/or demolition to certified landfills from area authorized."
2. The Commission received written protests from the following carriers: Butte Services, Inc., PSC No.1995; BFI Waste Systems of North America, Inc. (BFI), PSC No. 1581; Peter P. DelGiudice and Rebecca L. DelGiudice dba B & P Services (B&P), PSC No. 3568; and Rus-Kins, Inc., PSC No. 9320.
3. Following issuance of proper notice a hearing was held on July 15, 2003 in the Grange Hall, on Lynch Street, in Plains, Montana. At the hearing the parties requested the Commission issue a Proposed Order. The Hearing Officer, at the request of the parties, established a briefing schedule consisting of two rounds of simultaneous briefs, with the initial briefs due on or before September 8, 2003, and the reply briefs due on or before September 22, 2003.
4. On August 20, 2003, Protestant BFI moved to reopen the administrative record. On September 9, 2003, Applicant filed a response to BFI's motion. On September 23, 2003, BFI filed a reply in support of its motion to reopen the record. This motion is dealt with in this order.

5. Applicant and Protestant BFI submitted timely briefs.¹

SUMMARY OF TESTIMONY

Applicant's Witnesses

6. Deborah Warren, Realtor, resident of Plains, Montana, testified that she had arranged for the applicant to demolish and remove a house for a client, that her client was satisfied with the work done by the applicant, that hauling trash from a construction or demolition site was the kind of service that people who work with her as a Realtor would be using, and that there was a need for the type of service in her community, and that she was not aware of any carrier in the vicinity of Plains that did similar work. She testified that she did not know who exactly removed the debris for her client and that she did not know the extent of the applicant's business as a contractor as opposed to that as a transporter of trash.

7. Bob Frisk, retired, resident of Plains, Montana, testified that he had lived in the community for 27 years, that the applicant had hauled gravel and done roadwork for him using trucks and a Bobcat, that he had observed the applicant demolishing the house referred to by Deborah Warren and hauling the debris, that the applicant had hauled trailers that had burned, that there is a need in the community for someone to haul construction and demolition debris using a dump truck and small trucks, that he was not aware of any other carriers in the area that did similar work, that the applicant had to sort

¹ On October 10, 2003, the Commission received a document entitled "Protestor B & P Services, Inc. Response Brief." This document has not been considered by the Commission on the grounds that it is untimely and that B & P Services, Inc. is not a holder of any PSC authority. By letter dated July 7, 1995, Peter P. and Rebecca L. DelGiudice were advised, "The Annual Report reflects that in April, 1994 your company incorporated to B & P Services, Inc. *To date, this incorporation, and subsequent name change have not been filed with the Public Service Commission.* A sale and transfer application must be completed for a name change. . . . **No operations should be conducted under B & P Services, Inc. until the Public Service Commission approves the sale and transfer application.**" The records of the Public Service Commission reflect that no sale and transfer application has been filed with respect to this certificate subsequent to July 7, 1995.

the debris to deliver it to the local landfill, that he did not and would not know of anytime that BFI had refused or failed to provide service in its service area. He also testified that he understood the applicant to have actually performed the demolition in all cases in which he had hauled debris.

8. Howard Austin, retired, resident of Paradise, testified that at his request the applicant had hauled away limbs, wood, and scrap wood that were in an alley using a dump truck, that he had never seen any other person do similar work in the fourteen years that he had lived in Paradise, that he had not looked under garbage service in the phone book before hiring the applicant, that he felt the applicant had done an excellent job in a safe manner, that he was waiting for the applicant to demolish a house and haul the debris, that the applicant had told him the house demolish and haul could not be done yet, that he received garbage service from B&P, and that he had not heard of BFI not providing service in its service area but that there was no reason why he would have heard of such an event.

9. Katherine Gorham, a café owner, resident of Paradise, testified that she had remodeled her café, that she needed someone to load and haul the debris from remodeling, that B&P would provide a dumpster but would not load, that she was not aware that BFI provided services in eastern Sanders county, that the applicant had hauled the debris and had done a wonderful job, that she preferred to deal with local people who would do the whole job and were knowledgeable about the regulations at the local landfill, and that due to the number of elderly people residing in Paradise there was a need for a service which would both load and haul debris.

10. Rose Sheehan, resident of rural Sanders County, testified that she lived seven miles west of Plains,² that she had lived in the area for thirty-five years, that she was familiar with the applicant, that her husband had done some demolition that generated debris consisting of boards and pieces of plywood, that the applicant had loaded and hauled the debris that her husband had put in a pile on the ground, that the applicant had cleaned up and smoothed the site, that she had not called the garbage service to perform this job because she was sure that they would not want to be bothered picking up boards and nails, that she had never seen the agents of the garbage service doing that sort of thing, that she did not know for certain that the garbage service would not have provided the service, and that she did not know that BFI had ever refused or failed to provide service.

11. Shara Petrick, resident of Paradise, testified that she had moved to the area in June of 2003, that on the property she rented she found considerable debris consisting of used appliances, an old camper, furniture, old fencing, windows, paneling, and other junk, that when she needed the debris hauled she asked around her neighborhood and her boss, Katherine Gorham, that people recommended the applicant, that she did not check into any other possibilities, that she chose the applicant because he was local, reasonable, prompt, and would load the debris, that a lot of elderly people in Paradise have told her that a service which both loads and hauls debris is definitely needed in the community.

12. John Roesler, owner of a machine welding shop, resident of Plains, testified that he had lived in the area about three years, that he was familiar with the applicant, that in September of 2002 the applicant had used a Bobcat and dump truck to clean out and haul

² The transcript at p. 46, line 4, indicates "Pines" rather than "Plains". Based on notes from the hearing, the Hearing Examiner believes that "Plains" is correct.

away iron, boxes, and other debris from his back room, that subsequently the applicant had removed excess concrete and a very large stump from his property, that he did not know of anyone else who would clean and haul in the manner that the applicant had, that he was very pleased with the applicant's services, that the applicant was quick and efficient and had proper equipment, that he would agree the applicant spent more time cleaning and loading than driving the debris to the Sanders County dump.

13. Toby Anderson, school janitor, resident of Plains, testified that at the request of the applicant's attorney he had called various transporters and asked for trailer house doors, cupboards, windows, paneling and plywood to be removed, that B&P told him they would pick up the items provided that they were reduced to four-foot pieces, that he called Butte Services, Inc., and Bob Butte told him that Butte Services could pick up the materials with a flatbed truck, that he called Haskins, that he called BFI four times from July 10th through July 13th to be answered by an answering machine, that he did not leave a callback message or number, and that on July 14th a woman at BFI told him they could pick the described items up in a rear-load truck.

14. Glenda Kolb, a resident of Plains, testified that she was familiar with the applicant, that she had not used the applicant's services, that she had worked at the Circle and the Town Pump in Plains, and at Quinns towards St. Regis, that the service for picking up the dumpsters at the places she worked was not adequate, that she encountered problems at work because the garbage receptacles were over-full, and that she thought more frequent service would have been appropriate but did not know if the frequency was determined by the garbage service provider or the customer.

15. Dean Curry, applicant, testified that his current business consisted of demolition and cleanup, gravel excavation, cutting and demolishing concrete, that the majority of his work was demolition and cleanup consisting of machine teardown and then transporting the debris, that he had discussed taking over the rental roll-off container business from Sanders County, that he had performed hundreds of demolition-type jobs all over Sanders County, with the majority in Plains, that he was familiar with the carriers in the area, that none of the existing carriers provided the same service he was providing, that he had various items of equipment ranging from that satisfactory for small jobs to large roll-off container jobs, that Sanders County had submitted a letter indicating that it did not object to his application, would retain its current service, but would not actively solicit customers for the rental roll-off service, that Sanders County would continue to provide service to the county's transfer stations, that he knew the economics of his proposed business, that he planned to take waste to a certified landfill in Missoula, that he was phasing out of the gravel and excavation business, that the rental roll-off business allowed for an efficient utilization of resources, that if he received the authority which he was seeking the majority of the work would be from Paradise to the west, and that he would not accept a rental roll-off into which a customer had put household garbage.

Protestants' Witnesses

16. On direct examination, Marc Johnson, site manager for BFI at Ronan, Montana (BFI – Ronan), resident of Ronan, testified that he had been employed by BFI for three years and had operated an independent garbage service in Sanders County for twenty-two years prior to being employed by BFI, that BFI had authority to haul in a 50-mile radius

from Ronan, Montana and in a 20-mile radius from Hot Springs, Montana, that he was familiar with the number of customers necessary to support an operation or route, that BFI had not provided service in Paradise, Montana, that BFI was willing and able to provide service to all points in its authorized territory, that BFI provided all services from household trash to high-volume industrial waste, that to his knowledge BFI had never refused service to anyone, that BFI did not make any money on garbage routes servicing Hot Springs and Dixon, that there was not sufficient business for more than one carrier in any part of Sanders County which BFI served, that the granting of applicant's request for authority would have a detrimental impact on his portion of BFI's operations, that disposal of asbestos requires special training, equipment, and arrangements, that he believed the applicant could not serve all of Sanders County with the proposed equipment, that eliminating that portion of Sanders County served by BFI from the applicant's authority would make it easier for the applicant to serve his proposed area, that some contractors purposely keep roll-off boxes longer than necessary during the busy construction season, that BFI did not provide loading service but did provide the names of contractors who would provide such service, that BFI would provide roll-off service in Paradise, Montana if requested, and that BFI advertised in the phone book for its service territory.

17. On cross-examination, Marc Johnson testified that the majority of BFI – Ronan's customers were residential customers, that the majority of BFI – Ronan's tonnage was generated by commercial customers, that roll-off business accounted for 22% of BFI – Ronan's revenue, that he did not know the percentage which was demolition waste, that during the past three years BFI had probably had maybe 20 roll-off box pulls in the area

from Niarada to Perma, that BFI charges \$85 per hour for roll-off service, that he did not know how many roll-off boxes Sanders County used in the Hot Springs area for rental service, and that any grant of authority for areas west of BFI's service area would not be prejudicial to its business.

18. Stacy Cheff, Office Manager for BFI – Ronan, resident of Charlo, Montana, testified that she had worked for BFI for three years and for Marc Johnson, her father in law, for five years prior to being employed by BFI, that she handled customer relations, customer phone calls, dispatching and customer accounts, that Sanders County is very rural, that she was not aware of BFI ever refusing service to any customer, that BFI met the special needs of some customers, that BFI was actively involved in the communities which it serves, that she had given the name of a contractor to a customer who needed a house demolished, and that she did not answer all of the phone calls made to BFI – Ronan.

19. Verlan Smith, Safety Officer for BFI, resident of Hot Springs, testified that he formerly owned and operated City Disposal, that he first became involved in the garbage hauling business in Sanders County in 1981, that the potential universe of customers in eastern Sanders county is very small, that he had had a roll-off service for a while, that no one had tried to compete with him, that he believed there could not be more than one roll-off service in eastern Sanders County, that during a year BFI would do half dozen, maybe a dozen roll-off jobs in the Hot Springs area, and that if BFI lost some construction and demolition customers it would be a loss to them.

20. Peter DelGiudice, co-owner of B & P Services (B&P), testified he had a permit for his area, that he thought he was protected by the PSC for his area, that he could but

did not haul much demolition waste, that he could not handle roll-off service, that he had no problem with the applicant having a Class D certificate limited to demolition waste but was concerned that the restriction could not or would not be enforced.

21. Becky DelGiudice, co-owner of B&P, testified that she and the co-owner had to pay a large amount of money for their permit when they purchased the business, that B&P had never had any prospective customer it could not service, that she was concerned about the enforcement of any restriction in a permit granted to the applicant, that B&P donates to various Sanders County events, that she was not aware of any time that the applicant had infringed on B&P garbage service, that Sanders County had never approached B&P about taking over the rental roll-off box business, that prior to March 2000, B&P had provided service for other than residential waste with one and one-half cubic yard dumpsters, and that if the applicant was not in the area B&P would provide service for demolition waste with its current equipment.

Public Witnesses

22. Robert Butte³, President of Butte Services, Inc., testified that he had a flatbed and yard and a half to six-yard boxes, that Sanders County provided roll-off service and did a good job, that Sanders County is large and the miles required to service it would be a lot for old trucks, that he did not believe the applicant could fulfill his obligations, that the applicant's servicing of roll-off customers currently served by Sanders County would not prejudice him, that expansion of hauling of demolition and roll-off business in his service area possibly could prejudice him,

³ Butte Services, Inc. is a protestant to the application herein. As a corporation, Butte Services, Inc., cannot appear pro se before the PSC. See *Weaver v. Law Firm of Graybill*, 246 Mont. 175 (1990); ARM § 38.2.314; and Commission Policy Statement on Practice of Law before the Commission.

23. Michael Haskins⁴ testified that his objection to the applicant being granted Class D authority was that he had paid for his authority by buying the business, that a subsequent purchaser of the applicant's authority might want to expand to other types of hauling, that he recommends contractors in the area who do demolition work and he provides ten-yard dumpsters to haul demolition debris away, that Sanders County does a good job of providing roll-off service, that he recommends Sanders County to people who call him requesting roll-off service, that if the applicant offered roll-off service in his area people may choose the roll-off service rather than the ten-yard dumpsters, and that he was concerned that purchasers of property may choose to put clean-up debris into roll-off boxes rather than contracting with him to clean up the site.

FINDINGS OF FACT AND DISCUSSION

24. Pursuant to Title 69, Chapter 12, Montana Code Annotated (MCA), the Commission supervises and regulates intrastate motor carrier service. § 69-12-201, MCA. The maintenance of an adequate common carrier transportation system has been declared a public purpose. § 69-12-202, MCA. To obtain motor carrier operating authority (Certificate), a motor carrier must file an application with the Commission, which will give notice of the filing and schedule a hearing upon filing of a protest or a request for a hearing. § 69-12-321, MCA.

25. Section 69-12-323(2), MCA, sets forth the criteria for a Commission decision on an application for a Certificate. The Commission must issue a Certificate if, based on the evidence, it finds that public convenience and necessity require authorization of the proposed service or any part thereof. The Commission considers the existing

⁴ Michael Haskins signed a protest for Rus-Kins, Inc. Rus-Kins, Inc. is a protestant to the application herein. See footnote 3, *supra*.

transportation service being furnished, the likelihood the proposed service will be provided permanently and continuously throughout 12 months of the year, and the effect of the proposed service on other essential and indispensable transportation service in the affected communities. For a Class D Certificate, the Commission may consider competition in determining the public convenience and necessity.

26. Section 69-12-415, MCA, provides that a Certificate may not be issued unless the applicant is fit, willing, and able to perform the service and comply with applicable statutes and the rules and orders of the Commission.

27. The Commission has interpreted §§ 69-12-323 and 69-12-415, MCA, as requiring it to address these issues before granting an application for a Certificate:

- a. Is the applicant fit and able to perform the proposed service?
- b. Does the public convenience and necessity require authorization of the proposed service?
- c. Can and will existing carriers meet the public need for the proposed service?
- d. Would the proposed service have an adverse impact on existing transportation service?
- e. (Discretionary for Class D applications, only) If there is a public need for the service and the applicant is fit to provide the service (even if existing carriers could meet the need or might be harmed by granting the application) would competition with existing carriers promote the public interest?

Fitness

28. The Commission makes a threshold determination of whether the applicant is fit, willing and able to provide the service, considering the following factors: (1) the financial condition of the applicant; (2) the intention of the applicant to provide the service sought; (3) the adequacy of the equipment the applicant has to perform the service; (4) the experience of the applicant in conducting the service sought; and (5) the nature of previous operations, if there are allegations of illegal operations.

29. The Commission finds that the Applicant has demonstrated that he is fit, willing, and able to provide the service for which he has applied. Applicant's financial capacity appears to be adequate to provide the limited service requested in a rural area such as Sanders County. There is no evidence to the contrary. Protestant BFI asserted that Applicant's listed assets of \$117,000 are insufficient to support the service for which the Applicant has applied, but offered no evidence to support its assertion. Applicant stated that he would be able to obtain loans as necessary. The Applicant has stated his intention to perform the service sought. There is no evidence to the contrary. The Applicant's equipment, with the additional equipment he intends to purchase, appears adequate to perform the service for which he has applied. Applicant testified to the adequacy of his current and potential equipment to provide the service sought, based on his prior provision of transportation incidental to a construction and demolition business and observation of service provided by Sanders County. If, and when, Applicant's business expands he will be able to acquire additional equipment as needed, and to hire additional drivers. There is no requirement that an applicant purchase equipment prior to being granted authority, or that service be provided with the newest equipment. Applicant has

business experience and has experience in hauling demolition waste incidental to his demolition business. Applicant does not have experience in operating a regulated motor carrier. Applicant has done considerable research regarding the proposed service, is able to operate the equipment which will be used, and stated that he is prepared to become qualified to handle asbestos by completing 40 hours of class work.

30. The Commission finds that Applicant intends to perform the service permanently and continuously 12 months of the year. Applicant stated this intention. There is no contrary evidence. Applicant has met the threshold requirement to demonstrate fitness.

Public Need and Convenience

31. In determining the public convenience and necessity, the Commission has traditionally followed the analysis of *Pan-American Bus Lines Operation*, 1 M.C.C. 190 (1936).

The question in substance is whether the new operation or service will serve a useful public purpose, responsive to a public demand or need; whether this purpose can and will be served as well by existing carriers; and whether it can be served by applicant with the new operation or service proposed without endangering or impairing the operations of existing carriers contrary to the public interest.

1 M.C.C. at 203.

32. The public need to meet in an application for a Certificate is shipper need. In a Class D application, this need is for garbage hauling service. It is a given that there is a public need to have garbage hauled. In this particular application, the need is for hauling of construction and demolition waste. Five shipper witnesses testified that the service applied for is needed in the areas near and within Plains and Paradise and west of Plains. It also can be inferred from the testimony of a public witness that the service is needed in

the area west of Plains. Additionally, the Applicant, as the operator of a demolition business, can be considered a shipper witness to the extent that transportation of waste which is not incidental to the demolition business.⁵ Applicant testified as to the need for the service throughout Sanders County. Two other witnesses, who do not qualify as shipper witnesses, testified as to the need for the service. No one testified that the service was not needed. The Commission finds that there is substantial public need for the service supported by shipper testimony in the areas near and within Plains and Paradise and west of Plains.

Ability and Willingness of Existing Carriers to Meet the Public Need

33. Currently two carriers provide roll-off service in Sanders County: Sanders County and BFI. Sanders County has indicated that it does not oppose this Application and would not actively seek customers if the application is granted. BFI is able and willing to meet the need within its service territory. If loading services are necessary it recommends a third party which could provide service to the shipper.⁶ No other carrier demonstrated an ability or willingness to provide roll-off service. Other carriers' equipment are limited in size to a maximum of between one and one-half yards and ten yards. One carrier specifically indicated that it could handle materials only up to a length of four feet. With the exception of BFI, all protesting carriers appearing at the hearing indicated that they did not object to the Applicant hauling construction and demolition waste. Additionally, representatives of protesting carriers not appearing at the hearing testified to the same. The Commission finds that in all areas except the BFI authorized

⁵ The issue of incidental transportation is analyzed in Paragraphs 41-43, *infra*.

⁶ The Commission takes administrative notice that according to the Montana Department of Transportation the shortest distance over public roads between Ronan, Montana and Paradise, Montana is 53 miles. BFI's pertinent authority authorizes service within 50 miles from Ronan. Consequently, Paradise, Montana is not within BFI's authorized service territory.

service area, the existing carriers are unable or unwilling to provide the service for which Applicant has applied.

Impact on Existing Essential and Indispensable Transportation Service/Competition

34. The Commission may consider competition as a factor in determining the public convenience and necessity of proposed service. The Commission may consider competition at any stage of the decision process.⁷

35. BFI provides roll-off service in a portion of eastern Sanders County. BFI corporate policy requires that each location be profitable. BFI-Ronan receives approximately twenty-two percent of its revenues from roll-off service. BFI-Ronan was not able to identify the percent of its roll-off revenue that was attributable to construction and demolition waste. BFI did not identify what portion of BFI-Ronan's roll-off revenues was derived from Sanders County. BFI did not provide information as to the current profit or loss of BFI-Ronan. BFI-Ronan charges \$85.00 per hour for its roll-off service. BFI has no competition for roll-off service in eastern Sanders County.

36. Butte Services, Inc. does not offer roll-off services. Butte Services, Inc. has Rus-Kins, Inc. as a competitor in the towns of Trout Creek, Noxon and Heron, and along State Route 200 from a point 20 road-miles southeast of Noxon to the Montana-Idaho border. Butte Services, Inc. has no competition in the balance of its service area. Butte Services, Inc.'s transportation services would not be prejudiced by grant of a Certificate to

⁷ BFI asserts that the Commission may consider competition only after it has determined that an applicant is fit and there is a need for the service. The Commission is not constrained in its discretionary consideration of competition. "When determining whether the public convenience and necessity requires the PSC to authorize additional authority, the legislature placed no limits on the order in which the PSC must evaluate competition" *Waste Management Partners of Bozeman, Ltd. v. Montana Dep't of Pub. Serv. Regulation*, 284 Mont. 245, 252, 944 P.2d 210, 214 (1997). A statement in *In the matter of Underdahl Farms, Inc.*, Order No. 6498, Docket No. T-00.56.PCN (Pub. Serv. Comm'n November 29, 2000) that competition may be considered if there is a need and the applicant is fit is descriptive and not limiting as to order. It is axiomatic however, that competition alone without need and fitness will not support a grant of authority.

Applicant. Any prejudice to Butte Services, Inc.'s demolition business is not within the scope of the Commission's jurisdiction or consideration.

37. Rus-Kins, Inc. does not offer roll-off services, but does offer ten-yard dumpsters to contractors and others for construction and demolition waste. Rus-Kins, Inc. offers non-regulated cleanup services. Rus-Kins, Inc. refers requests for roll-off service to Sanders County. Rus-Kins, Inc. has Butte Services, Inc. as a competitor in all of its service area except that area north of State Route 200 along State Route 56 within 20 road-miles of Noxon. Rus-Kins, Inc.'s transportation services would not be prejudiced to a grant of authority limited to construction and demolition waste in roll-off containers in its area. Any prejudice to Rus-Kins, Inc.'s non-regulated business is not within the scope of the Commission's jurisdiction or consideration.

38. B&P does not offer roll-off service. B&P requires shippers of construction and demolition waste to reduce the longest dimension of the waste to four feet or less. B&P has no competition in its service area. B&P would not be prejudiced by a grant of authority limited to construction and demolition waste.

Sanders County Roll-off Service

39. BFI asserts that Applicant should not be granted authority because Applicant will not be taking over the county's roll-off service. Sanders County represented that it did not oppose the application and that if a Certificate was granted it would not actively solicit customers. Sanders County did not appear at the hearing in this matter. Any other evidence in the record regarding the intention of Sanders County is irrelevant and was not relied on by the Commission.

40. BFI moved to reopen the administrative record to add a letter from the Sanders County Commissioners. The letter is irrelevant to the decision in this matter.

Incidental Transportation

41. BFI asserts that Applicant has provided and is proposing to provide transportation services incidental to his main business of demolition and cleanup and that Applicant should not be granted a Certificate because it is not needed.

42. Transportation service is not subject to Commission regulation if it is incidental to a principal business. The “incidental to” or “primary business” test requires that the transportation service be in furtherance of, in the scope of, and subordinate to a principal business. A “principal business” is a business which, in relation to the transportation, is clearly predominant and has a clear economic purpose, identifiable with certainty, of providing goods or services. “In the furtherance of” means directly benefiting by transporting when such transportation assists in achieving the economic purpose of the principal business, and does not include a benefit that merely generates additional profit. “In the scope of” means directly within the bounds of the economic purpose of the principal business and does not include transportation that is a tangent or an appendage. “Subordinate to” means lesser than, minor in comparison to, dependent on, existing because of, and controlled by. “Subordinate to” does not include transportation service which is a significant enterprise itself.

43. Applicant is proposing to provide transportation service which appears to be more than incidental transportation.⁸ Applicant is proposing to haul much of the waste to a

⁸ Applicant appears to have operated a business which offered demolition, cleanup and transportation. Whether such transportation met the primary business test is not before the Commission and no opinion is expressed thereon. Nothing in this order should be interpreted as prohibiting the

certified landfill near Missoula, Montana rather than to local landfills. At this juncture, before the business is operating, it is impossible to determine if the proposed operation will be merely incidental transportation. If Applicant fails to engage in the transportation of authorized commodities on a regular basis Applicant will be in violation of § 69-12-314(2), MCA.

CONCLUSIONS OF LAW

1. The Montana Public Service Commission properly exercises jurisdiction over the parties and matters in this proceeding pursuant to Title 69, Chapter 12, Montana Code Annotated.
2. The Commission has provided adequate notice and opportunity to be heard to all interested parties in this matter pursuant to the Montana Administrative Procedures Act (MAPA) requirements for contested case procedures. §§ 2-4-601 *et seq.*, MCA.
3. An applicant for a certificate of Class D operating authority must show that the public convenience and necessity require the proposed service. A determination of public convenience and necessity may include a consideration of competition. § 69-12-323, MCA.
4. Applicant is fit, willing, and able to provide the service requested.
5. Applicant has demonstrated a public demand or need for the proposed service in a portion of the service territory requested.
6. Existing protesting carriers are unable or unwilling to meet the public demand or need in a portion of the service territory requested.

7. Granting a portion of this application will not adversely affect the Protestants, or be destructive to an extent contrary to the public interest.

NOW THEREFORE IT IS ORDERED that the application of Dean R. Curry dba Dirty Deeds Contracting, Plains, Montana for a Class D Certificate of Public Convenience and Necessity is granted as follows:

Class D – Garbage between all points and places in Sanders County. Carrier is allowed to transport authorized commodities to certified landfills from territory authorized.

Limitations:

- (1) Transportation is limited to materials from demolition or construction projects.
- (2) Transportation within the town of Noxon, Montana and a twenty (20) mile radius thereof is limited to service provided using roll-off containers of greater than ten (10) cubic-yards capacity.
- (3) Transportation to or from any points within fifty (50) miles of Ronan, Montana is prohibited; EXCEPT that transportation for or from any points within ten (10) miles of Paradise, Montana is permitted.
- (4) Transportation to or from any points within twenty (20) miles of Hot Springs, Montana is prohibited; EXCEPT that transportation to or from any points within ten (10) miles of Plains, Montana is permitted.

IT IS FURTHER ORDERED that the Applicant must, within thirty (30) days of the mailing of the final order in this matter comply with all rules and regulations of the Montana Public Service Commission.

IT IS FURTHER ORDERED the BFI's Motion to Reopen the Record is DENIED.

DONE AND DATED this 31st day of October, 2003.

BOB ROWE, Commissioner

ATTEST:

Connie Jones
Commission Secretary

(SEAL)

NOTE: This Proposed Order is a proposal for decision. Each party has the opportunity to file exceptions, present briefs, and have oral argument before the Commission prior to a Final Order. See § 2-4-621, MCA. Exceptions must be filed within 20 days of the service date of this Proposed Order. Briefs opposing exceptions must be filed within 10 days thereafter. Oral argument, if requested, must be requested at or prior to the time of briefing. See ARM 38.2.4803.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the Proposed Order Number 6539, issued in Docket T-03.9.PCN in the matter of Dean R. Curry dba Dirty Deeds Contracting, Plains, Montana has today been sent to all parties listed.

MAILING DATE: October 31, 2003

FOR THE COMMISSION

FIRST CLASS MAIL

Dean R. Curry
dba Dirty Deeds Contracting
PO Box 484
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AS ITS INTERESTS MAY APPEAR:

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